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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. [redacted] 469

THOMAS W. ALEXANDER,

Petitioner,

v.

THE BUCKEYE CELLULOSE CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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COUNTER-STATEMENT OF QUESTION PRESENTED

Respondent is somewhat uncertain, even after a careful study and review of the Petition for Writ of Certiorari, as to precisely what question it is that Petitioner asks this court to review. No question is either expressed or suggested by the two paragraphs comprising that section of the Petition headed "QUESTIONS PRESENTED," found on Page 2 of the Petition. However, by inference drawn from a reading of paragraphs First and Second of that section of the Petition headed "REASONS FOR GRANTING THE WRIT," found on Page 4, Respondent believes that it must be the following question on which certiorari is sought by Petitioner:

"Were the District Court and the Court of Appeals for the Sixth Circuit correct in concluding that the Respondent did not, as the continuing corporation of a merger in which The Buckeye Cotton Oil Company and the Respondent were constituent corporations, implicitly assume and thus "revive" an alleged claim with respect to which recovery was already barred by limitations at the time of merger and the existence of which was unknown to respondent at the time of merger?"

RESPONDENT'S POSITION

It is Respondent's position that the District Court and the Court of Appeals were quite correct in their ruling on the question stated above. Of even greater importance in connection with the Petition submitted to this court, Respondent respectfully submits that this case presents no question of paramount public importance of the character of which this court should be asked to reveiw. This case involved nothing other than a determination of contractual rights and obligations of two private parties (or perhaps more accurately, the absence of any such rights and obligations) and the application of a statute of limitations and a merger statute with which both the District Court and the Court of Appeals were thoroughly familiar.

STATUTE INVOLVED

Respondent is unable to understand exactly why Petitioner feels that Title 28, U. S. Code Section 1652, 62 Stat. 944, should be called to the attention of the court in this Petition for Writ of Certiorari. Respondent believes that if any statute is involved in this petition, it is Section 1701.80 of Title 17 of the Ohio Revised Code, describing the effects of a merger in the State of Ohio. Section 1701.81 of Title 17 of the Ohio Revised Code is quoted in its entirety in Appendix A of this brief.

COUNTER-STATEMENT OF THE CASE

The following facts, correcting and supplementing those outlined in the Petition, should be brought to the attention of the court for a more complete understanding of the nature of the action, the position Petitioner has taken with regard to the effect of the merger between The Buckeye Cotton Oil Company and the Respondent, and the decisions of the District Court and the Court of Appeals:

1. This action, filed by Petitioner on January 31, 1958, sought recovery of compensation under an implied contract to pay for negotiating services allegedly rendered by Petitioner at Respondent's request. It has not been and is not "an action on a merger agreement," as Petitioner characterizes it in his statement of QUESTIONS PRESENTED.

2. Petitioner has claimed that the alleged negotiating services were beyond the scope of the normal services of a consulting forester which Petitioner contracted to perform under a Letter Agreement of October 6, 1950, which were performed by Petitioner, and for which Petitioner was paid in full the compensation fixed in the Letter Agreement.

3. As all services of any character performed by Petitioner for Respondent were completed prior to February, 1952, and Petitioner was advised of the termination of his retainer arrangement in a letter written by Respondent in February, 1952, the District Court concluded that Petitioner's cause of action, if any existed, must have accrued at a date no later than the end of February, 1952, and inasmuch as the applicable limitations period of three years had expired long before suit was filed in 1958, recovery on any claim which Petitioner might have had was barred.

4. Following oral argument on Respondent's Motion for Summary Judgment, in which Respondent urged a three-year limitations period, Petitioner amended his Complaint, pleading the fact of merger of The Buckeye Cotton Oil Company and the Respondent in October, 1955 and took the position that the Respondent, as the surviving corporation succeeding to the assets and liabilities of the constituent corporations in the merger, created a new promise by operation of law with respect to the Petitioner's claim, thus making any such claim legally enforceable, *even though the existence of any possible liability to Petitioner was unknown at the time of merger and any such claim had already been barred by the applicable statute of limitations.*
5. At no time during the proceeding before the District Court or before the Court of Appeals did the Petitioner contend that the existence of the claim for extra compensation now asserted was known to either The Buckeye Cotton Oil Company or the Respondent at the time of merger or at any time prior to the filing of suit on January 31, 1958. Accordingly, the Petitioner has never suggested, until the filing of this Petition for Writ of Certiorari, that the constituent corporations in the merger, The Buckeye Cotton Oil Company and the Respondent, could have possibly intended that the latter's assumption of the liabilities of the former included this particular claim of Petitioner which was, if it existed at all, unenforceable by reason of the bar of the statute of limitations.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. There Are No Special or Important Reasons for Review of Any Question Presented in This Cause on Writ of Certiorari.

It is, of course, within the discretion of this court to review questions on Writ of Certiorari as it deems them appropriate for review. However, in line with a legion of past decisions of this court and as expressly provided in *Rule 19. Supreme Court Rules*, this court will grant Writ of Certiorari only when there are special and important reasons for exercising its discretion to review. No such reason exists for review of any question presented in this case.

This case presents no question of conflict of decision between or among courts of appeal, no important state or territorial questions, no question of Federal law, and no decision in conflict with applicable decisions of this court. The case involves nothing other than a determination as to whether a claim based upon an implied contract between private parties has been barred by the applicable statute of limitations.

Petitioner attempts to create a question for review by this court through the simple device of reading into the decision of the Court of Appeals a holding that the Court of Appeals did not make. The Court of Appeals did not, as Petitioner suggests, hold that the intent of the parties with respect to an agreement of merger is a question of law. The Court of Appeals merely held that the provision in the Ohio Merger Statute which provides that a continuing corporation assumes, by operation of law, the liabilities of the constituent corporation in the merger, could not be construed to include a claim, unenforceable by reason of limitations, *absent* evidence that the parties recognized the existence of the barred claim and intended that it be revived as an obligation of the surviving corporation. The Court of Appeals went on to point out that not only was there no evidence of such an intent on the part of the constituent corporations of this merger, but Petitioner had never contended that either of the parties to the merger intended that it be revived and assumed by the surviving corpora-

tion. Any other decision by the District Court or the Court of Appeals would have the absurd result of holding that every merger of Ohio corporations operates to revive all claims barred by the statute of limitations, no matter how ancient, which may have existed against any of the constituent corporations and making such stale claims legally enforceable against the surviving corporation.

The Court of Appeals decision is not in conflict with the two decisions of this court cited by Petitioner: *American Stevedores Inc.* v. *Perello*, 330 U. S. 446, and *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Co.*, 350 U. S. 124. Both of these cases involved an action by a longshoreman for injuries sustained against the owner of the vessel on which the longshoreman was working when injured and in which the shipowner sought contribution from the stevedoring contractor employing the longshoreman as a joint tort feasor. In the *American Stevedores* case, an express indemnity agreement was pleaded and this court, finding the indemnity agreement ambiguous, held that evidence concerning the intention of the parties with respect to the indemnity should be considered by the District Court. In the *Ryan Stevedoring Co.* case, no express agreement of indemnity was present, but the court found an implied agreement to indemnify, and Justice Black, in a dissenting opinion, felt that the *American Stevedores* case at least required the court to send the case back to the trial court to determine the facts with respect to the intention of the parties on the question of indemnity.

There is no similarity in these decisions and the case at bar, for the scope of the indemnity in these cases was very much in issue and intent of the parties with respect to indemnity was relevant to this issue pleaded and urged by the parties. In the case at bar, however, the Petitioner has never contended that the constituent corporations in the merger even knew of the existence of Petitioner's claim at

the time of merger, much less having any "intention" to waive the benefit of the statute of limitations which had already made the claim, if any existed, legally unenforceable.

The decision of the Court of Appeals is in no way in conflict with the decision of the Court of Appeals for the Third Circuit in the case of *Renault* v. *L. N. Renault & Sons, Inc.*, 188 F. 2d 317, for the very same reason that the intent of one of the parties in issuing a check (the question being whether issuance of the check represented a partial payment with respect to an obligation which, absent the partrial payment, would be barred by the statute of limitations) was a vital issue in the case, pleaded and urged by the litigants, and the Court of Appeals concluded that there was sufficient evidence on the question of intent to submit that question to the jury.

Petitioner further argues that the decision of the Court of Appeals is in conflict with *Lehman Corporation* v. *Piggly Wiggly Corporation*, 103 N. E. 2nd 399, because, according to the Petitioner, the Hamilton County Court of Appeals construed the "law of Ohio" in a manner contrary to the construction of the Court of Appeals for the Sixth Circuit in the case at bar. Precisely wherein this supposed conflict lies is not stated by the Petitioner. The *Lehman* case involved the purchase of all of the assets and the assumption of all of the obligations and liabilities by a parent corporation of its subsidiary corporation. One of the obligations of the subsidiary corporation at the time of purchase by the parent was an outstanding lease of premises from the plaintiff's assignor, although this lease was not shown on the books of the subsidiary corporation and it was conceded that the parent corporation was not aware of the existence of the lease at the time of purchase. The decision of the Hamilton County Court of Appeals was nothing more nor less than a finding of transferee

liability in a case involving the purchase of all of the assets of one corporation by another, and an attempt by the purchasing corporation to deny liability to a claimant against the selling corporation. No question of "revival" of a claim barred by the statute of limitations was involved and the case did not involve a construction of the Ohio statute relating to mergers. The following statement of the court points up the holding in the case:

> "When Piggly Wiggly Corporation took possession of and title to the assets of Piggly Wiggly Stores, Inc., which upon its dissolution had become a trust fund, without paying anything therefor, it became a constructive trustee for the benefit of all those having *enforceable claims* against Piggly Wiggly Stores, Inc." (Emphasis ours.)

The effect of a succession of one corporation to the assets and business of another is a concomitant assumption of existing liabilities of the predecessor corporation, but no court, to our knowledge, has ever held that a corporation succeeding to the assets and business of another, whether by outright purchase, merger, or consolidation, assumes a new obligation to all past creditors of the predecessor corporation whose claims have been barred by the statute of limitations.

II. Petitioner Is Not in a Position to Contend for the First Time in This Petition That the Parties to the Merger Agreement "Intended" to Revive His Claim.

If it is now Petitioner's contention that The Buckeye Cotton Oil Company and Respondent, at the time of merger, recognized Petitioner's barred claim and intended that a new promise to pay it be made by Respondent as a part of the merger, this marks the first time this contention has been made. In the Court of Appeals, Petitioner urged that his claim was "revived" *by operation of law* as a result of

the merger. There was not the slightest suggestion that Petitioner claimed the parties *actually intended* to revive the claim; had this suggestion been made, the Court of Appeals would have refused to consider it as this contention was neither pleaded nor urged in the District Court. A new issue, not raised in the pleadings in the District Court or considered by it, cannot be raised for the first time on appeal. *Henry B. Walker, Jr.* v. *Felmont Oil Corporation*, C. C. A. 6, 1958, 262 F. 2d 163. And it is perfectly clear that this court will not consider a question not raised or passed upon in the District Court or the Court of Appeals. We cite only a few of numerous decisions of this court confirming this fundamental rule of appellate practice. An early statement of this rule is set forth in *Springer* v. *United States* (1880), 102 U. S. 586, wherein the court stated at page 593, "The point was not brought to the attention of the Court below and cannot, therefore, be insisted upon here." See also *Virtue* v. *Creamery Package Mfg. Co.* (1912), 227 U. S. 8; and *Becher Steel Company of America* v. *Cummings*, Atty. General (1935), 296 U. S. 74.

III. The Court of Appeals Did Not Hold, as Asserted by Petitioner, That "the Florida Three-Year Statute Destroyed, Extinguished, or Wiped Out the Obligation," nor Was It Necessary for the Court of Appeals to Consider This Question.

The Court of Appeals concluded, as did District Judge Darr, that "the merger agreement required The Buckeye Cellulose Corporation to pay only those obligations of its predecessors which were legally enforceable at the time of the merger." Whether the effect of the applicable three-year limitations was to extinguish the alleged obligation or merely to bar the remedy is completely immaterial, and it is respectfully submitted that there is absolutely no

point in engaging in an academic discussion of this completely irrelevant question in this Petition. It makes no difference whatsoever whether the supposed claim was extinguished or the remedy was barred; either conclusion means that the claim was not legally enforceable at the time of merger. The decision of the District Court and the Court of Appeals represented merely a reaffirmance of the general principle stated in *Fletcher Cyclopedia of the Law of Corporations, Volume 15, Section 713*, as follows:

> "A corporation which becomes liable for the debts and obligations of another company through consolidation, merger or purchase of property ordinarily stands in the same position as the old company with regard to such liability, and when sued thereon may assert the same equities, rights and defenses as would have been available to such other company."

That an alleged claim has been barred by the applicable statute of limitations is certainly one of the defenses of a constituent corporation which becomes available to a surviving corporation in a merger.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be denied for the reasons that:

1. The petition presents no special or important reasons for review by this Court.
2. The reason for review urged by Petitioner raises an issue which was neither pleaded nor considered in the District Court or in the Court of Appeals.

Respectfully submitted.

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